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IN THE

Supreme Court of the United States

October Term, 1961

No. 138

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

THOMAS E. ROHAN, MARTIN C. EPSTEIN, WILLIAM H. MORGAN, GRANT F. DANIELS and SAMUEL M. BIRNBAUM, Being the Chairman, Members and Commissioners of the State Liquor Authority of the State of New York,
Respondents.

Misc. 180

IDLEWILD BON VOYAGE LIQUOR CORPORATION,
Petitioner,

against

HONORABLE ALEXANDER BICKS, HONORABLE EDWARD J. DIMOCK, HONORABLE JOHN M. CASHIN, Judges of the United States District Court for the Southern District of New York,
Respondents.

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

Opinions Below

The first opinion of the District Court (BICKS, J.), dated November 4, 1960, is reported at 188 F. Supp. 434 (49a-55a).[1]

The second opinion of the District Court (DIMOCK, J.), dated December 28, 1960, has not been officially reported (88a-92a).

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[1] All references are to the Record herein.

The majority and dissenting opinions of the Court of Appeals, dismissing petitioner's appeals from the orders entered upon the foregoing decisions, are reported at 289 F. 2d 426 (103a-115a).

The subsequent decision of the District Court (CASHIN, J.), dated May 3, 1961, is reported at 194 F. Supp. 3 (130a-135a).

The District Court (BICKS, J.) ruled that "The threshold issue is whether the federal courts should accept jurisdiction now since the issues have never been presented to or passed upon by the state courts" (52a). The judge held that he had "the power to retain jurisdiction pending state court adjudication where, as here, there is insufficient basis to support intervention by a federal court of equity" (55a). Accordingly, Judge BICKS ordered abstention, denied the petitioner's application for the convening of a statutory three-judge Court, and retained jurisdiction with leave to renew the application after the State Court has ruled (55a).

The Court of Appeals held that determination of the question of abstention was a prerogative of the statutory Court and that it was incumbent upon the District Court, in the circumstances of this case, to convene the statutory Court. Concluding that the District Court was without jurisdiction to make the order, which it construed as, in effect, a dismissal of the complaint, it held that, constrained by this Court's decision in *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10 (1930), the petitioner had to be relegated to a motion in this Court for leave to file a petition to mandamus the District Court Judge to convene a statutory Court. Accordingly, it dismissed the appeal (105a-109a).

Jurisdiction

The grounds on which the jurisdiction of the Court is invoked are set forth in Petitioner's Brief (p. 2).

On October 9, 1961 this Court granted the petition for a writ of certiorari and for leave to file a petition for a writ of mandamus.

Questions Presented

1. Are the operations of the petitioner subject to the paramount control of the State by virtue of the Twenty-first Amendment to the Federal Constitution?[2]

2. Did the single-judge District Court have jurisdiction to order abstention and retain jurisdiction, pending State Court adjudication, as part of its function in passing upon the substantiality of the Federal question which it was required to find before it could order the convening of a statutory Court?

3. Did the District Court properly exercise its discretion in ordering abstention in the circumstances of this case?

Constitutional Provisions and Statutes Involved

Involved in this case are:

United States Constitution, Amendment XXI, § 2;[3]
27 U. S. C. § 121;[4]
28 U. S. C. §§ 1254(1), 1651(a), 2281 and 2284;[5]
New York Laws of 1935, ch. 246.[6]

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[2] The substantive question of State law (*i.e.*, an essential part of the merits of the controversy) is not before this Court.

[3] Set forth at page 18, *infra*.

[4] Set forth at page 18, *infra*.

[5] The pertinent provisions of these sections are set forth in the Appendix to this brief, pp. 41-42, *infra*.

[6] Set forth in Appendix to this brief, p. 43, *infra*.

Statement

An essential and integral part of the merits of the instant controversy is not now before this Court. In other words, the question of whether or not the transactions engaged in by the petitioner come within the ambit of proscribed acts under New York's Alcoholic Beverage Control Law §§3(28), 100(1) and 105(2), is purely a matter of State law and is not presented for the consideration of this Court.

Of relevance to the questions presented is the fact that by the complaint herein the petitioner seeks a declaratory judgment determining that the State statutes above mentioned, as sought to be applied to the petitioner, are violative of the Federal Constitution and certain Federal statutes and regulations which are asserted to be exclusive and preemptive in character. The petitioner also seeks a preliminary and permanent injunction of enforcement of the State statutes by the respondents, Rohan, *et al.*, against the petitioner (13a-14a).

The petitioner applied for the convening of a statutory three-judge District Court (32a-34a) and the respondents (Rohan, *et al.*, as the State Liquor Authority) cross-moved for a dismissal of the complaint (42a-43a).

On November 4, 1960 the District Court (Bicks, J.) denied the petitioner's motion for a statutory Court and held that the threshold issue was whether the Federal Court could accept jurisdiction at this time since the issues have never been presented to or passed upon by the State Courts.[1] The Court concluded that, although substantive

[1] The petitioner does not predicate the jurisdiction of the Federal Court on diversity of citizenship or any other basis, but rests solely on the alleged violation by the State statutes, as sought to be applied, of the Federal Constitution and of allegedly exclusive and preemptive Federal legislation and regulations (8a-12a).

issues raised in the complaint may not be considered by the Judge to whom an application is made, it has the power to order abstention and to retain jurisdiction pending State Court adjudication where, as here, there is insufficient basis to support intervention by a Federal Court of equity (50a-55a). The Court did not pass upon the respondents' motion to dismiss the complaint.

Upon appeal to the Court of Appeals (56a), the latter Court dismissed the appeal. The majority opinion of the Court of Appeals was to the effect that, since the complaint challenged the validity, under the Federal Constitution, of a State statute by reason of its claimed application to the petitioner, it was clear that a statutory Court should have been convened, this being the tribunal which deals with constitutional challenges of State activity. However, the Court held that if the District Court fails to convene the statutory Court and dismisses the complaint, the remedy is by writ of mandamus from the Supreme Court.

The Court of Appeals held that although, before convening a statutory Court, the District Court does have jurisdiction to determine the existence of a substantial Federal question, and although this question is properly reviewable by the Court of Appeals, the question of abstention, pending prior determination by the State Courts of the State issue, is only within the jurisdiction of a statutory Court and, thus, is not reviewable by the Court of Appeals.

Having held that Judge Bicks had no jurisdiction to make the determination which he made, the Court of Appeals decided that it, too, had no jurisdiction to entertain

the appeal. Since, as it held, a statutory Court should have been convened, the Court of Appeals dismissed the appeal.[8]

Summary of Argument

I

As to petition for writ of mandamus to compel convening of three-judge Court.

Since the petitioner has predicated the jurisdiction of the Federal Court on the sole ground that the State statute, as sought to be applied to it by the threatened action of the State officers, is violative of the commerce clause, the export-import clause, and the supremacy clause of the Federal Constitution, it is incumbent upon the single-judge District Court and it is within that Court's jurisdiction to determine the substantiality of the Federal question which is presented. Indeed, until the question of substantiality is determined favorably to the plaintiff (petitioner) there is no proper basis for the convening of a statutory three-judge District Court.

If, however, the Federal question is inextricably intertwined with a question of uncertain State law, without the resolution of which by the State Courts it cannot be determined whether there is, in fact, a Federal question before the Court or the posture in which the Federal question is presented, it is obvious that the Court cannot pass upon the substantiality of the Federal question. In such case, in order that a complete case may be submitted it is within

[8] The statement above should be sufficient as the basis for a complete consideration of the questions presented. The decisions of DIMOCK and CASHIN, JJ., are merely cumulative. Further facts relating to the petitioner's operation will be set forth in the ensuing argument.

the proper jurisdiction of the single-judge District Court to order abstention pending the resolution of the State question by the State Courts.

The substantiality of the Federal question presented in the case at bar depends upon the resolution of the question of State law as to whether the transactions in which the petitioner was involved, as vendor, constitute "sales" within the meaning of the State statutes.

The petitioner contends that the State statutory regulations are subject to the paramount regulation of the Federal Government under various constitutional provisions and under various Federal statutes and regulations in implementation of the constitutional provisions. The petitioner has misconceived this question as one of State law, although obviously it is a Federal question which has clearly been settled by the Federal Courts. This Court has held that, by virtue of the Twenty-first Amendment to the Federal Constitution, the regulatory rights of the State respecting intoxicating liquors are paramount to the regulatory rights of the Federal Government.

Under these circumstances, there being an adequate remedy in the State Courts, the District Court properly exercised its discretion in ordering abstention. Orderly procedure dictates that further progress in the determination of the substantiality of the Federal question await the final adjudication of the question of State law by the State Courts. Until the single-judge District Court is advised of such final adjudication by the State Courts it is not in a position to pass upon the substantiality of the Federal question and, therefore, is not in a position nor does it have jurisdiction to convene a statutory three-judge District Court. It follows inexorably that the petition for a writ

of mandamus from this Court to compel the convening of the statutory Court is premature and should, therefore, be dismissed.

II

As to Certiorari

If, as shown above, the single-judge District Court had jurisdiction, the Court of Appeals also had jurisdiction. Instead of dismissing the appeal it should have affirmed the decision of the District Court. However, there is no valid reason for disturbing the decision of the Court of Appeals because the ultimate result is the same in either event.

If, however, this Court agrees with the Court of Appeals that the District Court was without jurisdiction and that, consequently, it, too, was without jurisdiction, then this Court must agree that, based upon its own prior decision in *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10 (1930), certiorari does not lie. In *Stratton*, under identical circumstances, this Court directed the Court of Appeals to do exactly what it has done in this case.

By reason of the foregoing the petition for certiorari should be dismissed as having been improvidently granted.

III

Alternative Solution

Since the parties and the lower Courts have bogged down in a morass of procedural and jurisdictional complexities which are alleged to have created anomalous results, it is in order for this Court, as a practical solution, to dispose of this matter in a manner that is eminently fair

to both parties. It is suggested that this Court enter an order as follows:

(a) Grant the petition for mandamus;

(b) Remand the case to the single-judge District Court with instructions to cause the convening of a statutory three-judge District Court;

(c) Direct the statutory three-judge District Court to retain jurisdiction, but stay further proceedings pending the disposition of the related queston of State law by the State Courts.

ARGUMENT

POINT I

The petition for a writ of mandamus to compel the convening of a three-judge Court is premature because the single-judge Court is not in a position to determine the existence of a substantial Federal question.

The point here made, to put it in a nutshell, is that even though a potential Federal question lurks in the background, if the situation involved, legal or factual, has not ripened to the point where only a Federal question remains undetermined, there is not presented to the Federal Court the "complete product"[9] which is required as the basis for present determination of an unavoidable Federal question. What the situation would be in the event that ultimately, related non-federal questions remain unresolved need not presently concern us because it must be assumed that, given adequate means of relief in a State

[9] *Harrison* v. *NAACP*, 360 U. S. 167, 178 (1959).

forum and proper presentation of the question of State law to that forum, the State Court will not shirk its duty and will resolve the question.

A. The single-judge District Court has jurisdiction to determine the existence of a substantial Federal question before requesting the convening of a statutory three-judge Court.

In the case at bar a single-judge District Court has refused to convene a statutory Court on the ground that, because of the "tentative and hypothetical posture" (53a) of the case, he is unable to find that there exists the substantial Federal question which is an essential perequisite to the convening of the statutory Court. That a single-judge District Court has jurisdiction of this question was the purport of this Court's decision in *Ex parte Poresky*, 290 U. S. 30 (1933). In that case a motion was made in this Court for leave to file a petition for a writ of mandamus to compel the convening of a three-judge Court. Leave was denied, the Court saying (pp. 31-32):

> "[T]he provision requiring the presence of a court of three judges necessarily assumes that the District Court has jurisdiction. • • • 'A substantial claim of unconstitutionality is necessary for the application of § 266.' *Ex parte Buder*, 271 U. S. 461, 467; *Louisville & Nashville R. Co.*, v. *Garrett*, 231 U. S. 298, 304. *That provision does not require three judges to pass upon this initial question of jurisdiction.*
>
> • • •
>
> [T]he District Judge clearly has authority to dismiss for the want of jurisdiction when the question lacks the necessary substance and no other ground of jurisdiction appears."[10] (Emphasis added.)

[10] As has already been observed, the petitioner predicates jurisdiction solely on the presence of the Federal question.

See, also: *Waddell* v. *Chicago Land Clearance Commission*, 206 F. 2d 748, 749 (7th Cir., 1953); *Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372, 376 (N. D. Alabama, 1958), affd. 358 U. S. 101 (1958).

B. In the exercise of its proper jurisdiction the single-judge District Court has discretion to invoke the doctrine of abstention.

The greater power includes the lesser power. Since, as held in *Poresky, supra*, the single-judge District Court has the right to *dismiss* the complaint for want of a substantial Federal question,[11] it must necessarily have the right to invoke the doctrine of abstention and *retain* jurisdiction so that it may later have before it the "complete product" upon which it can intelligently and properly base a determination respecting the existence or non-existence of a substantial Federal question.

Indeed, this Court has already held that a single-judge District Court, in circumstances similar to those here presented, has the power to invoke the doctrine of abstention. In *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639 (1959), the appellee instituted suit in the District Court for a declaratory judgment that a State statute did not apply to it, and that, if it did, it was violative of the Federal and State Consitutions. The case was tried before a single-judge District Court on the merits and the statute was held invalid (154 F. Supp. 736 [S. D. Mississippi, 1957]). The Court of Appeals affirmed (256 F. 2d 83 [5th Cir., 1958]). The appellant moved this

[11] The Courts have continued to follow the rule in the *Poresky* case by holding that a single-judge District Court can dismiss a complaint if it presents no substantial federal question (*White* v. *Gates*, 253 F. 2d 868, 869 [D. C. Cir., 1958]; *Wicks* v. *Southern Pac. Co.*, 231 F. 2d 130, 135 [9th Cir., 1956], cert. den. 351 U. S. 946 [1956]).

Court to vacate the judgment of the Court of Appeals and remand the case to the District Court with instructions to vacate its judgment and *convene a three-judge Court* under 28 U. S. C. §§ 2281 and 2284 to consider appellee's complaint. Without passing on the merits of the motion, this Court vacated the judgment of the Court of Appeals, and remanded the case to the District Court (single-judge) with directions *to hold the cause while the parties repair to a State tribunal for an authoritative declaration of applicable State law.* It is interesting to note that in the cited case, as in the instant case, the sole predicate for Federal jurisdiction was the alleged invalidity of a State statute "as repugnant to the Constitution, treaties or laws of the United States" (p. 640). See, also: *Chicago, Duluth & Georgian Bay Transit Co.* v. *Nims*, 252 F. 2d 317 (6th Cir., 1958); *Snyder's Drug Stores* v. *Taylor*, 227 F. 2d 162, 165 (8th Cir., 1955).

As a matter of fact, this Court has recognized the power of a single-judge District Court in this respect both before and after its decision in the *Meridian* case, *supra*. In *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168 (1942), in a suit, which was within the ambit of three-judge District Court jurisdiction, the single-judge District Court determined the question of State law which was involved (35 F. Supp. 451 [N. D. Illinois, 1940]), as did also the Circuit Court of Appeals (122 F. 2d 132 [7th Cir., 1941]). This Court vacated the judgment and remanded "the cause to the District Court [single-judge] with directions to retain the bill pending a determination of proceedings in the state Court in conformity with this opinion" (p. 173).

In *Spector Motor Service Co.* v. *McLaughlin*, 323 U. S. 101 (1944), again in a suit which fell into the jurisdiction

of a three-judge Court, the single-judge District Court decided the case on the merits, including the question of State law (47 F. Supp. 671 [D. Connecticut, 1942]). The Circuit Court of Appeals reversed the District Court, but its decision, too, was based upon a consideration of the merits (139 F. 2d 809 [2nd Cir., 1944]). This Court vacated the determination of the Appellate Court and remanded the cause to the single-judge District Court "with directions to retain the bill pending the determination of proceedings to be brought with reasonable promptitude in the State Court in conformity with this opinion" (p. 106).

Subsequent to its decision in *Meridian, supra*, the Court had before it *Louisiana Power & Light Co.* v. *City of Thibodeaux*, 360 U. S. 25 (1959), in which the District Court (single judge) ordered abstention (153 F. Supp. 515 [E. D. Louisiana, 1957]) and the Court of Appeals reversed the decision (255 F. 2d 774 [5th Cir., 1958]). This Court reversed the judgment of the Court of Appeals and reinstated the abstention order of the District Court (pp. 30-31). On the same day this Court rendered its decision in *County of Allegheny* v. *Frank Mashuda Co.*, 360 U. S. 185 (1959). Here a single-judge District Court had dismissed the suit on principles of abstention (154 F. Supp. 628 [W. D. Pennsylvania, 1957]). The Court of Appeals reversed the lower Court (256 F. 2d 241 [3rd Cir., 1958]) and this Court affirmed on the ground that the circumstances of the case did not justify abstention. The majority of the Court in this case held that the District Court had abused its discretion in invoking the doctrine of abstention. The minority were of the view that the District Court had acted within its proper discretion. What is of paramount interest here is that neither the

majority nor the minority questioned the right of the District Court to exercise its discretion in determining whether it should or should not abstain. They merely disagreed as to whether it had abused its discretion or exercised it properly.

Both *Mashuda* and *Thibodeaux*, of course, were cases in which a three-judge Court was not called for. But the point here made is that, where a single-judge District Court has conceded jurisdiction, no matter what the basis of that jurisdiction may be, it has discretion, under proper circumstances, to order abstention. Since, in the case at bar, the single-judge District Court had jurisdiction to determine the existence of a substantial Federal question, it has the subsidiary or supplemental right to determine whether the question is ripe for Federal Court consideration. If it is not, abstention can be ordered to permit the question either to be ripened or withered by State Court action.

However, the Court of Appeals, in the case at bar, has said that it is "of the opinion that the determination of whether a federal Court ought to abstain is a determination that may only be made in the first instance [in circumstances such as here] by a three-judge district court" (108a). Cited in support of this statement is this Court's opinion in *Alabama Public Service Comm.* v. *Southern Ry. Co.*, 341 U. S. 341, 350 (1951), but, we find no justification for the statement in the cited case.

Nor is there support for this position in the statutes governing procedure and jurisdiction where three-judge District Courts should properly be convened. The only restraint upon the action of the single-judge District Court is that it shall not issue an interlocutory or

permanent injunction in such cases and that such action can be taken only by a three-judge District Court (28 U. S. C. § 2281).

It is quite clear that the single-judge District Court had the power to invoke the doctrine of abstention and that its power in this respect has not been statutorily or otherwise forbidden or limited.

In holding that the single-judge Court does not have the power to abstain the Court of Appeals reasoned that a decision to abstain is different from a preliminary determination of substantiality, since abstention, not being automatic, presupposes jurisdiction that is subsequently surrendered (107a-108a). This distinction appears to have been accorded unwarranted weight. A decision to abstain is similar in many ways to the determinations of lack of substantiality and want of equity in the complaint. These dispositions are not discretionary, but are mandatory when the criteria established by this Court have been met by the facts in a particular case. (See, *e.g.*, *Harrison* v. *NAACP*, 360 U. S. 167 [1959], involving abstention; *American Federation of Labor* v. *Watson*, 327 U. S. 582 [1946], involving abstention; *California Water Service Co.* v. *City of Redding*, 304 U. S. 252 [1938], involving substantiality; *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89 [1935], involving equity.) Further, a decision on any of these grounds is addressed to the issue of whether the case may be adjudicated on the merits, and, in this sense, is a jurisdictional determination. It should also be noted that the three-judge legislation has consistently been narrowly construed to avoid the draining of judicial manpower that would be occasioned by unnecessary conventions of three-judge Courts. (*E.g.*, *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368 [1949]; *Phillips* v. *United States*, 312 U. S.

246 [1941].) The major reason for the existence of three-judge Courts is to provide more deliberate decisions on constitutional questions, and it follows that a case should not be presented to such a Court until a single-judge Court has deemed it ripe for adjudication on the merits. Therefore, since it is well established that a single-judge District Court has the power to determine the jurisdiction of a Federal District Court, the foregoing considerations support the conclusion that the inquiry of whether to abstain may be conducted by a single-judge as well as by a three-judge Court.

C. Where, as here, a question under the Federal Constitution is dependent upon the resolution of an uncertain point of State law, the State remedy being adequate, the District Court properly exercised its discretion in invoking the doctrine of abstention.

The petitioner, a New York corporation, conducts business from premises which it occupies at the Idlewild Airport in New York under a lease which provides that the demised premises may be used as an office for the receipt of orders for export of United States customs bonded wines and liquors. The wines and liquors sold by the plaintiff are not for consumption in the State of New York. The demised premises are under the supervision of the Bureau of Customs. The wines and liquors sold are purchased solely for export from vendors who withdraw the goods from Class 6 United States Customs bonded warehouses for rewarehousing at the United States Customs-controlled space in petitioner's leased premises. The design and purpose of the method of operation is to prevent diversion of the bonded merchandise to any use other than export from the United States.

Petitioner receives orders and payment at its premises at the airport from passengers departing by non-stop planes destined for foreign countries. The merchandise is delivered to the air line with approved documents for foreign export, delivery to be made to the passenger-purchaser only upon arrival at the foreign destination. The United States Treasury Department has approved these procedures. (Complaint; 1a-14a.)

The Attorney General of the State of New York has ruled that the business of the petitioner constitutes "sales" or "selling" within the meaning of New York State Alcoholic Beverage Control Law § 3(28), that that law contains no provision which would authorize issuance of a license to petitioner to conduct its business, and that under § 100(1) of the State Law no person is permitted to sell any alcoholic beverage within the State without a license (1960 Op. Atty. Gen. 8, dated June 30, 1960; 21a-24a).

Petitioner urges that the New York statutes, as sought to be applied to it, are repugnant to (a) the commerce clause, (b) the clause prohibiting a State from laying imposts or duties on imports or exports without the consent of Congress, and (c) the supremacy clause of the constitution and, therefore, are unconstitutional. These contentions rest on the claim that the Tariff Act of 1930 as amended, and the regulations adopted thereunder, taken together with the applicable provisions of the Internal Revenue Code, constitute a comprehensive, exclusive and pre-emptive scheme duly adopted by Congress for the regulation, encouragement and promotion of foreign commerce in, and export of, bonded wines and liquors.

1. Regulation of the liquor traffic in the State by the State is paramount to the Federal Government's right to regulate whether under the constitutional provisions governing commerce, exports and imports, and supremacy, or under statutory and regulatory provisions of a preemptive character.

Basic to the consideration of this question is the Twenty-first Amendment to the Federal Constitution (repeal of the Eighteenth Amendment). Section 2 of the Amendment reads as follows:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Of relevance also in this connection is the *Webb-Kenyon Act* (27 U. S. C., ch. 6), dealing with the transportation of intoxicating liquors in interstate commerce. Section 121 reads as follows:

> "All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, *sale* or *storage* therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by being introduced therein in original packages or otherwise" (Emphasis added).

The interpretation of the Twenty-first Amendment is, of course a Federal question, and the relationship thereunder of State rights of regulation to Federal rights asserted under other provisions of the Constitution may be and has been considered by this other Federal Courts.

In *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59 (1936), this Court held that under § 2 of the

Twenty-first Amendment the State's power of regulation of the liquor traffic is paramount to the Federal Government's control over interstate commerce. It was expressly held that United States Constitution, Art. 1, § 8, cl. 3 may be overridden by State legislation regulating transportation and commerce in liquor.

In *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132 (1939), the appellant argued, *inter alia*, that, despite the Twenty-first Amendment, exports remain subject to the commerce clause and free of State regulations. This Court affirmed the lower Court's rejection of the appellant's argument, saying (p. 138):

> "The Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause. Without doubt a State may absolutely prohibit the manufacture of intoxicants, their transportation, sale or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them. [Citing cases].
>
> Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions? Former opinions here make an affirmative answer imperative."

In *Carter* v. *Virginia*, 321 U. S. 131 (1944), a judgment sustaining the validity of a State statute regulating transporation of intoxicating liquor through the State (interstate commerce) was affirmed. In a concurring opinion, Mr. Justice Frankfurter said (pp. 140-141):

> "The legislation is sustainable under the Twenty-first amendment on one of two considerations. It is a notorious fact that State prohibition laws were to no small measure evaded by illicit diversion of liquor

> claimed to be transported through a State. Since we are dealing with a constitutional amendment that should be broadly and colloquially interpreted, liquor that enters a State in the manner in which the liquor here came into Virginia may, without undue liberty with the English language, be deemed to be for 'delivery' there even though it is consigned for another state. The Twenty-first Amendment prohibits the 'transportation or importation into any State * * * of intoxicating liquors, in violation of the laws thereof,' not when the liquor is for delivery *and* use but for 'delivery *or* use therein.' In other words, liquor need not be intended for consumption in a State to be deemed to be imported into the State and therefore subject to control by that State." (Emphasis by Mr. Justice Frankfurter.)

And in *United States* v. *Renken*, 55 F. Supp. 1 (W. D. South Carolina, 1944), affd. 147 F. 2d 905 (4th Cir., 1945), cert. den. 326 U. S. 734 (1945), the Court said (pp. 6-7):

> "Under the 21st Amendment it is entirely up to the state whether liquor can be imported into, or delivered or used within its borders. Since it can prohibit, it may permit under such terms as it sees fit, untrammeled by the due process clause, * * * the equal protection clause, * * * or the commerce clause of the Constitution, * * *."

See also: *Mahoney* v. *Triner Corp.*, 304 U. S. 401, 404 (1938); *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U. S. 391, 394 (1939); *Dunn* v. *United States*, 98 F. 2d 119, 121 (10th Cir., 1938); *Hayes* v. *United States*, 112 F. 2d 417 (10th Cir., 1940); *Johnson* v. *Yellow Cab Transit Co.*, 137 F. 2d 274, 275 (10th Cir., 1943), affd. 321 U. S. 383 (1944); *Washington Brewers Institute* v. *United States*, 137 F. 2d 964, 966-967 (9th Cir., 1943), cert. den. 320 U. S. 776 (1943); *Jatros* v. *Bowles*, 143 F. 2d 453, 455 (6th Cir., 1944); *General Sales & Liquor Co.* v. *Becker*, 14 F. Supp. 348, 349-350 (E. D. Missouri, 1936); *Wylie* v. *State Board of Equalization*, 21 F. Supp. 604, 605 (S. D. California, 1937).

In *California* v. *Washington*, 358 U. S. 64 (1958), a case arising under the original jurisdiction of this Court, motion was made for leave to file a bill of complaint. The undersigned appeared on behalf of the State of New York, as *amicus curiae*, in support of the bill, and contended that the Twenty-first Amendment did not subordinate Federal rights arising under the commerce clause to State regulatory rights. We specifically requested the Court to overrule its decision in *State Board of Equalization* v. *Young's Market Co., supra.* The Court rejected our argument and denied leave to file the bill.

Stated succinctly and by way of summary of the Federal view on this point, the classification of paramount State power recognized by the Twenty-first Amendment cannot be deemed forbidden by Article I, § 8, Cl. 3, Art. I, § 10, Cl. 2, or the Supremacy clause (Art. VI) any more than such classification can be deemed forbidden by the Fourteenth Amendment (*State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59, 64 [1936]).

Incidentally, it may be noted that in the papers in support of its application for a preliminary injunction the petitioner, by its president, alleged as follows (36a):

> "The bonded, tax-free wines and liquors, from the time they are withdrawn from these bonded warehouses *to the time they are loaded on the carrier*, remain in the continuous custody and under the continuous supervision of the Bureau of Customs." (Emphasis added.)

It may be observed that from the time the merchandise is loaded on the plane to the time of actual departure it is literally physically in New York State and concededly under no direct governmental supervision or control. Constructively, at least, the merchandise may be considered "delivered" at this moment, even though it is assumed that it has not been delivered prior to that moment.

This point, as has already been stated, is a Federal question as to which the Federal Courts have very definitely and explicitly expressed their views. Any decision of a New York Court to the contrary (such as *Rosenblum* v. *Frankel*, 279 App. Div. 66, 108 N. Y. S. 2d 6 [1st Dept., 1951]) is not binding upon this Court. In any event, the other cases cited by the petitioner[12] may be distinguished from the case at bar.

In *Matter of Gulf Oil Corp.* v. *McGoldrick*, 256 App. Div. 207, 9 N. Y. S. 2d 544 (1st Dept., 1939), affd. 281 N. Y. 647, 22 N. E. 2d 480 (1939), affd. 309 U. S. 414 (1940), the Court disallowed a city sales tax on oil held in bonded warehouses, class 6, on the ground that this was an unconstitutional interference with foreign commerce. But this case dealt with *oil*—not *liquor*. The impact of the Twenty-first Amendment was not present in this case.

In *During* v. *Valente*, 267 App. Div. 383, 46 N. Y. S. 2d 385 (1st Dept., 1944), the decision, holding that liquor stored for export purposes in a Foreign Trade Zone, an isolated, enclosed and policed area under the supervision of a designated board of Federal officials, created under Federal statute (19 U. S. C., ch. 1A, §§ 81a *et seq.*) and pursuant to agreement entered into *under State statutory authorization* (L. 1935, ch. 246), was free of State regulation, is wholly different from a situation such as appears in the case at bar where the liquor, though under bond, is on the petitioner's private premises in one of the buildings in the Idlewild Airport in New York State. All that was held in the *During* case was that the Foreign Trade Zone, erected in the Port of New York by the city under 19 U. S. C. §§ 81a *et seq.*, was created under the exclusive and plenary power of Congress to regulate commerce with

[12] At pages 40-43 of its brief.

foreign nations, notwithstanding the fact that the zone was within the geographical limits of the State of New York. The statute which authorized the City of New York to make application to the Federal Board under the Foreign Trade Zone Act (L. 1935, ch. 246) expressly provided that if the application were granted, the city was "to establish, operate and maintain such zone in accordance with law" (*i. e.*, with the governing Federal law). This may be construed to constitute a legislative surrender by the State of the right to enforce State regulations in that area in much the same fashion as a cession of sovereignty to the Federal Government concededly effects that result with respect to other Federal enclaves.

As bearing upon the State's view of its rights in the Foreign Trade Zone the Court's attention is called to *New York Operators* v. *State Liquor Authority*, 285 N. Y. 272, 34 N. E. 2d 316 (1941), in which the State Court of Appeals said (p. 277):

> "[T]he foreign distilled spirits * * * are brought into the trade zone [*i. e.*, the Foreign Trade Zone] from abroad, and are treated by the Federal Government as foreign commerce which has not entered the United States, that is, the same as if it were still on the high seas."

The Court held that an action for a declaratory judgment could be brought to determine whether the State has the constitutional power to control and tax merchandise brought into the trade zone from abroad.

Matter of Birner v. *Santa Lucia Wineries, Inc.*, 155 Misc. 722, 282 N. Y. Supp. 257 (Sup. Ct., New York Co., 1935), involved a shipment of wine in interstate commerce, the seller being a nonresident of New York State and not licensed therein, to a New York purchaser, delivery being made f. o. b. at a point outside New York State. The sale,

however, was made in New York State by the resident purchaser with an authorized representative of the non-resident seller. The Court held that, though interstate in character, the sale took place in New York State and was violative of the State statute which required that a seller of wine in New York State be licensed by the State Alcoholic Beverage Control Board.

The conclusion is inescapable as to this purely Federal question. The language of the Twenty-first Amendment is clear. Under it the states are free to enact laws concerning the transportation within, or the importation into the states or the exportation out of the states, of alcoholic beverages, unfettered by the power delegated to the Federal Government to regulate commerce among the states and with foreign powers. This does not deny to the Federal Government the right to exercise its acknowledged jurisdiction in the field of interstate and foreign commerce so long as such jurisdiction is considered supplemental to the jurisdiction of the State. The Federal Government, however, must exercise its rights in subservience to, and not in hostility to, or denial of, the paramount State rights.

The cases cited by the petitioner, which support the view that the State cannot tax merchandise in interstate or foreign commerce, or the cases in which State interference is predicated upon powers other than those which arise under the Twenty-first Amendment (licensing of motor vehicles, for example), it being merely coincidental that the merchandise affected consists of wines and liquors, are not relevant to this point. Such State powers do not deal with the police power reserved to the states under the Twenty-first Amendment. They deal with the taxing power and the police power generally. Concededly, such powers of the State are subordinate to the Federal powers because as to such powers the wines and liquors are considered

merely as merchandise generally. Regarded as such, the Federal power is supplemental to and not in hostility to that part of the State's police power as is constitutionally rendered invulnerable and absolute under the Twenty-first Amendment. The petitioner's assertion that the Federal controls render the licensing requirements of the State law a nullity is a definite assertion of hostility and cannot be sustained.

2. Under the circumstances of this case an order of abstention constituted a proper exercise of discretion.

Petitioner has brought the instant action for a declaratory judgment adjudging that the State statutes, as sought to be applied to the petitioner, are unconstitutional under the Federal Constitution. It seeks also an interlocutory and permanent injunction. Intertwined with the constitutional question is an uncertain point of State law: Do the transactions in which the petitioner is involved, as vendor, at its premises in the Idlewild Airport constitute "sales" within the meaning of New York Alcoholic Beverage Control Law §§ 3(28) and 100(1)? Until this preliminary State question is resolved the Federal Court is unable to determine whether a Federal constitutional question has been presented or not.

The case at bar furnishes the clearest instance of a case in which abstention is justified—where State action is challenged in a Federal Court as contrary to the Federal Constitution and there is a question of uncertain State law present in the case. In *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496 (1941), the progenitor of this line of cases, the company sought to enjoin enforcement of a Commission order. In addition to the Federal constitutional question presented, there was a substantial question of

State law as to whether the Commission had been statutorily empowered to make the order in question. Although, by reason of the jurisdiction of the Federal Court which follows upon the existence of a Federal question, the Federal Court also possesses ancillary jurisdiction to decide State issues (*Siler* v. *Louisville & N. R. R.*, 213 U. S. 175 [1909]), the wisdom of exercising such ancillary jurisdiction is doubtful. As this Court said in the *Pullman* case, *supra* (p. 500):

> "In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. • • • The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication."

As this Court said in *Harrison* v. *NAACP*, 360 U. S. 167 (1959) at page 177:

> "[T]his principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication."

The Court continued (p. 178):

> "We do not intimate the slightest view as to what effect any such determinations might have upon the validity of these statutes. All we hold is that these enactments should be exposed to state construction or limiting interpretation before the federal courts are asked to decide upon their constitutionality, so that federal judgment will be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court."

For these important reasons the abstention doctrine has been applied in many cases where Federal constitutional

questions are intermingled with questions of State law. For example: *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168, 171-173 (1942), in an injunction action to prevent allegedly unconstitutional interference with plaintiff's sale of milk in a particular type container, there was a question as to whether, as a matter of State law, the city had the power to prohibit the container; *Spector Motor Service Co.* v. *McLaughlin*, 323 U. S. 101, 104-106 (1944), in a suit attacking a State tax as unconstitutional, there were questions of State law as to whether the statute applied to the appellant and what it was the State was seeking to tax; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450 (1945), involving questions as to the interpretation of a State act regulating certain labor unions, which were challenged as unconstitutional; *American Federation of Labor* v. *Watson*, 327 U. S. 582, 595-596, 598 (1946), State right to work law, attacked as unconstitutional, had not yet been construed by the State Court; *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368 (1949), territorial statute, not yet construed by territorial Courts, attacked as unconstitutional, regulating teaching in foreign language schools; *Shipman* v. *Du Pre*, 339 U. S. 321, 322 (1950), suit for a declaratory judgment that a State statute, not yet construed by the State Courts, regulating the fisheries and shrimping industry, was unconstitutional; *Albertson* v. *Millard*, 345 U. S. 242, 244, 245 (1953), injunction action against enforcement of a State Communist Control Act not yet construed by the State Courts; *Leiter Minerals, Inc.* v. *United States*, 352 U. S. 220 (1957), claim by United States in action to quiet title that an unconstrued State statute if applicable to the United States, was unconstitutional; *City of Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639 (1959), State statute challenged as unconstitutional under both State and Federal Constitutions; *Harrison* v.

NAACP, supra, State Courts had not yet construed State statute affecting plaintiff association, enforcement of which plaintiff sought to enjoin on constitutional grounds. See also: *Government & Civic Employees Organizing Committee, CIO* v. *Windsor,* 116 F. Supp. 354 (N. D. Alabama, 1953), affd. 347 U. S. 901 (1954); *Government & Civic Employees Organizing Committee, CIO* v. *Windsor,* 353 U. S. 364, 366 (1957). In the latter case this Court ordered a second abstention, stating:

> "The bare adjudication by the Alabama Supreme Court that the union is subject to this Act does not suffice since that Court was not asked to interpret the statute in the light of the constitutional objections presented to the District Court."

The controlling policy governing abstention is that a Federal Court will not decide a constitutional question where decision can go on other grounds. In *Louisiana Power & Light Co.* v. *City of Thibodeaux,* 360 U. S. 25 (1959), the Court wrote broadly of the District Court "exercising a fair and well-considered judicial discretion in staying proceedings" (p. 30). Setting the boundaries of this discretion is not difficult. We confidently submit that the District Court *must* stay the case and order abstention, pending State adjudication of the State issue, where a Federal constitutional question is intermingled with unsettled questions of State law. Here the line of decisions, stemming from *Pullman,* is clear and compelling, and reflects not only the policy of avoiding unnecessary interference in State affairs which underlies abstention generally, but also the policy that Federal Courts will not decide Federal questions so long as the cases can be decided on other grounds. Indeed, in *Louisiana P. & L. Co.* v. *Thibodeaux,* this Court, 360 U. S., at page 28, referred to the fact that in *Leiter Minerals, Inc.* v. *United States, supra,*

> "[W]e have *required* District Courts, and *not merely sanctioned* an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination." (Emphasis added.)

(a) There has been no State adjudication of the State question involved herein.

It is conceded that abstention is inappropriate where the State law is settled. In such event, even though the Federal constitutional questions which the case may raise are serious, the Federal Court must proceed to a decision, since no useful purpose is served by remitting the parties to a State Court (*Public Utilities Comm. of Calif.* v. *United States*, 355 U. S. 534 [1958]; *City of Chicago* v. *Atchison, T. & S. F. R. R.*, 357 U. S. 77 [1958]).

The petitioner asserts that the State law question has already been settled by the New York Courts (Point V, Petitioner's Brief, pp. 40-43). But the petitioner has misconceived the issue of "State" law which is involved herein. It states the question as one involving the inapplicability of State regulation to matters under the alleged superior Federal jurisdiction. This, however, is a Federal question which has already been discussed under Sub-point C 1, *supra*.[13]

The true State question which is inherent in this case and which must be decided by the State Courts before the constitutional question is ripe for consideration by the Federal Courts is: Do the transactions in which the petitioner is involved, as vendor, at its premises in the Idlewild Airport constitute "sales" within the meaning of New York Alcoholic Beverage Control Law §§ 3(28) and

[13] Pages 18-25 of this Brief.

100(1)? The Attorney General of the State of New York has ruled that they do constitute "sales" as defined in the statutes (21a-24a). It is conceded, however, that there has been no judicial adjudication of the question in New York. The petitioner cites no cases on this point and we have been unable to find any.

(b) The State remedy is adequate.

The petitioner has a completely adequate remedy available in the State Courts for the resolution of the State question by way of an action for a declaratory judgment. This was decisively determined in *New York Operators* v. *State Liquor Authority*, 285 N. Y. 272, 34 N. E. 2d 316 (1941), wherein the Court said (pp. 276-277):

> "The can be no doubt that the necessary jural relation exists between plaintiff and defendants. Enforcement of the State Alcoholic Beverage Control Law (Cons. Laws, ch. 3-B) and the power to issue licenses thereunder is vested in the State Liquor Authority.
>
> • • • By this action plaintiff seeks a determination whether it must procure such a license in order to perform the acts described in the complaint. The necessity of a license may be the subject of an action for a declaratory judgment."

The petitioner, however, predicates its claim that the relief is inadequate upon the fact that it will sustain irreparable harm unless the respondents, Rohan *et al.*, are restrained from any action that they might take to enforce the statute against it. It points to the fact that under the State's Alcoholic Beverage Control Law (§ 121) it is limited to a 30-day stay. It is conceded also that, by virtue of 28 U. S. C. § 2281, the single-judge District Court, has no power to grant a stay pending abstention. However, we do not hesitate to assure the Court, and we have been

authorized by the State Liquor Authority to make such assurances, that the respondents, constituting the State Liquor Authority, will refrain from instituting enforcement proceedings until, or base penalties on conduct occurring before, the dispute is settled. With such assurances there can be no question regarding the adequacy of the State remedy (*Harrison* v. *NAACP*, 360 U. S. 167, 179 [1959]).

Furthermore, the argument of the petitioner as to the inadequacy of its remedy in the State Courts by reason of the 30-day limitation as to any stay of enforcement, as provided in Alcoholic Beverage Control Law § 121, is without any basis, legally or factually, because the petitioner's cause of action does not arise under § 121. That section reads as follows:

> "§ 121. Review by courts.
>
> The following actions by the liquor authority shall be subject to review by the supreme court in the manner provided in article seventy-eight of the civil practice act or by any other appropriate remedy provided that no stay shall be granted pending the determination of the matter except on notice to the liquor authority and for a period not exceeding thirty days:
>
> 1. Refusal by the liquor authority to issue a license or a permit.
>
> 2. The issuance of a license or permit by the liquor authority contrary to the recommendations of a local board.
>
> 3. The issuance of a license or permit by the liquor authority where the recommendation of a local board was not unanimous.
>
> 4. The revocation, cancellation or suspension of a license or permit by the liquor authority.
>
> 5. The failure or refusal by the liquor authority or a local board to render a decision within the time required by section one hundred twenty.

6. The transfer by the liquor authority of a license or permit to any other premises, or the failure or refusal by the liquor authority to approve such a transfer.

7. The issuance of an order of warning by the liquor authority.

8. Refusal to approve alteration of premises."

The petitioner's complaint does not arise from an adverse determination of the State Liquor Authority within its conceded general jurisdiction or within the specific category of reviewable determinations as set forth in § 121. Rather it is based upon an assertion that the Authority is *without jurisdiction* to act either way by reason of the alleged paramount and pre-emptive rights of the petitioner under Federal law. The latter action is not one which is brought under § 121 and is not subject to the limitations of that section. Rather, the action in the State Courts would be brought under New York's Civil Practice Act, § 473, which provides that:

"The supreme court shall have power in any action or proceeding to declare rights and other legal relations on request for such declaration whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment. Such provisions shall be made by rules as may be necessary and proper to carry into effect the provisions of this section."

New York Operators v. *State Liquor Authority*, 285 N. Y. 272, 34 N. E. 2d 316 (1941), held that an action for a declaratory judgment may be brought against the State Liquor Authority.

The forms, practice and rules applicable to other actions in the Supreme Court have been made applicable to actions for a declaratory judgment (Rules of Civil Procedure, Rule

210). The relevant provisions of New York's Civil Practice Act respecting the right to enjoin the respondents, Rohan *et al.*, pending determination of the State litigation, are §§ 877 and 879. Section 877 provides as follows:

> "Where it appears from the complaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act, the commission or continuance of which during the pendency of the action would produce injury to the plaintiff, an injunction order may be granted to restrain it. The case provided for in this section is described in this act as a case where the right to an injunction depends upon the nature of the action."

Section 879 reads:

> "Where a duty is imposed by statute upon a state officer or board of state officers, an injunction order to restrain him or them, or a person employed by him or them, from the performance of that duty, or to prevent the execution of the statute, shall not be granted except by the supreme court at a term thereof sitting in the department in which the officer or board is located or the duty is required to be performed; and upon notice of the application therefor to the officer, board or other person to be restrained."

Thus, it clearly appears that the petitioner may obtain an injunction *pendente lite* in the State Courts if it demonstrates in the State proceeding that it is properly entitled thereto. Under these circumtances the petitioner cannot properly assert that the State remedy is inadequate because it may be subjected to irreparable harm by reason of the fact that enforcement of the statute cannot be temporarily stayed.

(c) The fact that no State action is pending is not an impediment to the invocation of the doctrine of abstention.

Petitioner asserts that power to abstain may not be exercised where no State action is presently pending (Petitioner's Brief, pp. 21-22). But this is contrary to many cases of this Court which have directed abstention pending disposition of the question of State law by the State Courts in an action to be brought thereafter.

For example: *Albertson* v. *Millard*, 345 U. S. 242 (1953), where the lower Court was directed (p. 245)

> "to hold the proceedings in abeyance a reasonable time pending construction of the statute by the state courts either in pending litigation or *other litigation which may be instituted.*" (Emphasis added.)

See also, *Spector Motor Service Co.* v. *McLaughlin*, 323 U. S. 101 (1944), wherein the Court remanded the cause to the District Court (p. 106)

> "with directions to retain the bill pending the determination of proceedings *to be brought* with reasonable promptitude in the State court in conformity with this opinion." (Emphasis added.)

D. The petition for a writ of mandamus to compel the convening of a statutory three-judge District Court is premature.

In view of the fact that the single-judge District Court has jurisdiction to determine the substantiality of the Federal question, which is the sole ground alleged to confer jurisdiction, as an essential prerequisite to the convening of a statutory three-judge Court, and in view of the fact that the substantiality of the Federal question is not ripe for consideration by the single-judge District Court

until an intermingled matter of State law is first settled by the State Courts, it is clear that the single-judge District Court is not presently in a position nor does it have jurisdiction to convene a statutory three-judge District Court.

Under such circumstances it is obvious that the petition for a writ of mandamus to compel the convening of a statutory three-judge Court is premature and the petition should be dismissed.

POINT II

The petition for certiorari to review the decision of the Court of Appeals should be dismissed, as having been improvidently granted, because, either both Courts below were without jurisdiction, or jurisdiction being present, abstention could be ordered by a single-judge District Court.

A. Assuming jurisdiction in the single-judge District Court, the Court of Appeals should have affirmed the order of the District Court instead of dismissing the appeal. The results, however, are identical.

Point I of this brief establishes, we believe, the following propositions:

(a) That the single-judge District Court had jurisdiction to determine the substantiality of the Federal question which was the sole basis for jurisdiction;

(b) That the determination of substantiality by the single-judge District Court was an essential prerequisite to the convening of a statutory three-judge District Court;

(c) That in order to determine the question of substantiality of the Federal jurisdictional question the single-

judge District Court possessed the power to order abstention pending the disposition of an intermingled question of State law by the State Courts;

(d) That in the circumstances of this case the single-judge District Court properly exercised its discretion in ordering abstention.

Since, as demonstrated in Point I, the single-judge District Court had jurisdiction, the Court of Appeals likewise had jurisdiction. Its dispositive action, therefore, despite the motion made by the respondent, Rohan *et al.*, to dismiss the appeal, should have been to affirm the decision of the Court below rather than to dismiss the appeal.

In view of the fact, however, that the ultimate result upon dismissal of the appeal is identical with the ultimate result which would have ensued upon an affirmance, the petition for certiorari should be dismissed.

B. Assuming lack of jurisdiction in the single-judge District Court, the Court of Appeals, likewise, had no jurisdiction to hear the appeal. In dismissing the appeal the Court did exactly what this Court would have directed it to do.

The petitioner seeks to restrain the respondents, Rohan *et al.*, from enforcing certain State statutes against it.

Assuming, *arguendo*, that the power to abstain resided exclusively in a statutory three-judge District Court, as was held herein by the Court of Appeals (108a),[14] it would follow, as the Court of Appeals held, that a single-judge District Court was without jurisdiction to order abstention. It would also follow that the Court of Appeals, too, under such circumstances would be without jurisdiction to enter-

[14] We have demonstrated the error of this view in Point IB, *supra*, pp. 11-16.

tain an appeal from such order and would be constrained to dismiss the appeal. That is exactly what the Court of Appeals held and did upon the authority of this Court's decision in *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10 (1930).

In *Stratton* this Court said (p. 16):

> "Nor does an appeal lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this Court."

A petition to this Court for certiorari is the very height of futility because in the *Stratton* case this Court held that if an order of a single-judge District Court, failing to convene a three-judge District Court, is appealed to a Court of Appeals, which fails to correct the jurisdictional error, and review is then sought in this Court of the decision of the Court of Appeals, this Court will reverse the decree of the Court of Appeals and remand the case to that Court with directions to dismiss the appeal for want of jurisdiction. That, however, is exactly what the Court of Appeals has already done.

Almost identical with the situation in the case at bar was *Green* v. *Clancy*, 350 U. S. 910 (1955). In this case action was brought to enjoin State officers from enforcing a State statute against the petitioner. The latter moved for the convening of a three-judge District Court. The respondents' cross-motion to dismiss the complaint on the grounds that a substantial federal question was not presented, that a plain, speedy and efficient remedy was available in the New York Courts, and that construction of the

State statute should first be determined by the New York Courts, was granted by the single-judge District Court. On the basis of the foregoing this Court denied a motion for leave to file a petition for writs of prohibition and mandamus.

POINT III

Alternatively, this Court, as a practical solution, may grant the petition for mandamus and remand the case to the single-judge District Court with instructions to cause the convening of a statutory three-judge Court. Further instructions may be given by this Court to the statutory Court directing it to abstain from further proceedings but to retain jurisdiction pending determination of the State question by the State Courts.

The petitioner, asserting a threatened infringement of its rights under the Federal Constitution, may have a cause of action which it can assert in the Federal Courts. It should not be foreclosed from bringing such suit nor should it be subjected to irreparable harm pending the judicial determination of those rights. On the other hand, the Federal Court, whether single-judge or three-judge in character, cannot be asked to adjudicate the Federal question until an inextricably intermingled State question is first adjudicated by the State Courts.

Unfortunately, the parties and the lower Courts have become enmeshed in a maze of complexities relating to jurisdiction and procedure. However, like Alexander the Great, this Court, as a practical solution, can cut the "Gordian knot" by making the following order:

(a) Grant the petition for mandamus;

(b) Remand the case to the single-judge District Court with instructions to cause the convening of a statutory three-judge District Court;

(c) Direct the statutory three-judge District Court to retain jurisdiction, but stay further proceedings pending the disposition of the related question of State law by the State Courts.

If the alternative disposition which has been suggested is adopted by the Court reliance need not be had on the voluntary assurances of the respondents, Rohan *et al.*, to refrain from enforcement action nor on interlocutory restraint by the State Courts. Under the suggested alternative procedure the statutory three-judge District Court has undoubted power to restrain such action *pendente lite* (28 U. S. C. §§ 2281 and 2284).

Similarly, if the alternative procedure is adopted, it becomes unnecessary for the Court to determine whether the single-judge District Court has the power, in the first instance, to order abstention.

CONCLUSION

The petition for a writ of mandamus should be dismissed. The petition for writ of certiorari should be dismissed, as having been improvidently granted. Alternatively, the case should be remanded with instructions to convene a statutory Court and with directions to the statutory Court to order abstention pending State Court adjudication of the related question of State law.

Dated: Albany, New York, December 15, 1961.

Respectfully submitted,

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Appendix

28 U. S. C. § 1254(1)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *"

28 U. S. C. § 1651(a)

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U. S. C. § 2281

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

28 U. S. C. § 2284

"* * *

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the Trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction

or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State."

New York Alcoholic Beverage Control Law

(Consol. Laws, Chap. 3-B)

"§ 3. Definitions.

* * *

28. 'Sale' means any transfer, exchange or barter in any manner and by any means whatsoever for a consideration, and includes and means all sales made by any person, whether principal, proprietor, agent, servant or employee of any alcoholic beverage and/or a warehouse receipt pertaining thereto. 'To sell' includes to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell and shall include the delivery of any alcoholic beverage in the state."

"§ 100. Alcoholic beverages generally.

1. No person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license therefor required by this chapter.

* * *"

"§ 105. Provisions governing licensees to sell at retail for consumption off the premises.

* * *

2. No premises shall be licensed to sell liquors and/or wines at retail for off premises consumption, unless said premises shall be located in a store, the entrance to which shall be from the street level and located on a public thoroughfare in premises which may be occupied, operated or conducted for business, trade or industry or on an arcade or sub-surface thoroughfare leading to a railroad terminal."

New York Session Laws.

L. 1935, ch. 246

"Section 1. The city of New York is hereby authorized to make application to the board established by the act of congress, approved June eighteenth, nineteen hundred thirty-four, entitled 'An act to provide for the establishment, operation and maintenance of foreign trade zones in ports of entry of the United States, to expedite and encourage foreign commerce, and for other purposes,' for a grant to such city of the privilege of establishing, operating and maintaining a foreign trade zone in the borough of Richmond within such city, pursuant to the provisions of such act, and if such application be granted, to accept such grant and to establish, operate and maintain such zone in accordance with law. The authorization hereby granted shall extend to and cover any application heretofore made for such purpose by the city of New York pursuant to the act of congress hereinbefore described, and to any amendment of such an application."